LIBRARY
SUPREME COURT U. S.

FILED
JUN 26 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 285

THE FEDERAL BROADCASTING SYSTEM, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

EDWARD J. GRENIER, JR.
1200 Farragut Building
Washington, D. C. 20006
Counsel for Petitioner

Of Counsel:

SUTHERLAND, ASBILL & BRENNAN
1200 Farragut Building
Washington, D. C. 20006

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	3
STATUTES INVOLVED	3
STATEMENT	3
REASONS FOR GRANTING THE WRIT	12
1. The Commission's Arbitrary Refusal To Consider Petitioner's Solemn Commitment To Dispose of Its Rochester Station, While Taking Into Consideration Other Post-Record Changes of Decisional Significance, Requires Reversal and Remand of the Case to the Commission	15
2. The Commission's Arbitrary Refusal To Consider the New Information Submitted by Petitioner in Response to the *Policy Statement*, Which Substantially Changed the Ground Rules Governing Comparative Broadcast Proceedings, Requires Reversal and Remand of the Case to the Commission	22
3. The Commission's Failure To Give a Rational Explanation of (1) Its Refusal To Consider Petitioner's Commitment To Divest, as Developed in the Preceding Two Points, and (2) Its Preference for Flower City Requires Reversal and Remand of the Case to the Commission	23
CONCLUSION	24
APPENDIX A	1a
APPENDIX B	24a
APPENDIX C	31a
Opinion of the Court Below	31a
Judgment	50a
APPENDIX D	51a
APPENDIX E	52a

INDEX TO CITATIONS

CASES:	Page
Acardi v. *Shaughnessy*, 347 U.S. 260 (1954)	23
Broadcasters, Inc., 29 F.C.C. 366, 19 R.R. 731 (1960)	20
Burlington Truck Lines, Inc. v. *U.S.*, 371 U.S. 156 (1962)	23
Channel Assignment in Rochester, New York, 21 R.R. 1748a (1961)	3
Community Television Corp., 32 F.C.C. 923, 24 R.R. 1 (1962)	20
Farragut Television Corp., 5 F.C.C. 2d 93, 8 R.R. 2d 552 (1966)	17
FCC v. *RCA Communications, Inc.*, 346 U.S. 86 (1953)	23
Flower City Television Corp., 9 F.C.C. 2d 249, 10 R.R. 2d 1059, *reconsideration denied*, 10 F.C.C. 2d 718, 11 R.R. 2d 771 (1967)	1-2, 7, 8, 9, 10, 11, 13, 16, 17, 18, 19, 20, 21, 23
Flower City Television Corp., 9 F.C.C. 2d 264 (1964) (Initial Decision)	2, 7
Hi-Line Broadcasting Co., 22 F.C.C. 891, 13 R.R. 1017 (1957)	19
ICC v. *Louisville & N. Ry.*, 227 U.S. 88 (1912)	21
Indianapolis Broadcasting, Inc., 22 F.C.C. 421, 12 R.R. 883 (1957)	17
Lewis Broadcasting Corp., 11 F.C.C. 2d 889, 12 R.R. 2d 627 (1968)	17
Phelps Dodge Corp. v. *Labor Board*, 313 U.S. 177 (1941)	23
Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 5 R.R. 2d 1901 (1965)	6, 8, 14, 17, 22, 23
Red Lion Broadcasting Co. v. *FCC*, 37 U.S.L. Week 4509 (June 9, 1969)	15
Report of Changed Circumstances, 3 R.R. 2d 1622 (1964)	21
SEC v. *Chenery Corp.*, 318 U.S. 80 (1943)	23
Service v. *Dulles*, 354 U.S. 363 (1957)	23
Scenic Hudson Preservation Conference v. *FPC*, 354 F. 2d 608 (2d Cir. 1965)	21
Siegel Co. v. *FTC*, 327 U.S. 608 (1946)	23

Page

St. Louis Telecast, Inc., 22 F.C.C. 625, 12 R.R. 1289 (1957) 19
Television Broadcasters, 27 F.C.C. 727, 17 R.R. 1169 (1959) 17
Travelers Broadcasting Serv. Corp., 21 F.C.C. 110, 12 R.R. 689 (1956) 19
Vitarelli v. *Seaton*, 359 U.S. 535 (1959) 23
WHDH, Inc., 33 F.C.C. 449, 24 R.R. 255 (1962) 17-18
WHDH, Inc., 16 F.C.C. 2d 1, 15 R.R. 2d 411, *reconsideration denied*, 16 R.R. 2d 185 (1969) 14, 16, 17-18
WHEC, Inc., 24 F.C.C. 147, 14 R.R. 150, *aff'd*, 106 U.S. App. D.C. 162, 270 F. 2d 914 (1959), *cert. denied*, 362 U.S. 935 (1960) 17

STATUTES AND REGULATIONS:

Communications Act of 1934 3
47 U.S.C. § 402(b) 15
28 U.S.C. § 1254(1) 2
47 C.F.R. § 1.65 21

OTHER:

FCC Public Notice, Report No. 8571 (June 4, 1969) ... 15
Fisher, *The President's Comment*, 21 Fed. Com. B.J. 117 (1967) 13
Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv. L. Rev. 1055 (Part 2, 1962) 13-14
Friendly, *The Federal Administrative Agency* (1962) 21
Grunewald, *Should the Comparative Hearing Process Be Retained in Television Licensing*, 13 Amer. U.L. Rev. 164 (1964) 13
Landis, *Report on Regulatory Agencies to the President-Elect*, Subcommittee on Administrative Practice and Procedure of Senate Committee on Judiciary, 86th Cong., 2d Sess., p. 53 (Committee Print 1960) 14

Page

Landis, *The Administrative Process* (1938) 21

Levin, *Regulatory Efficiency, Reform and the FCC*, 50 Geo. L.J. 1 (1961) 14

ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION:

FCC 61-1511, released January 2, 1962 4

FCC 62-385, released April 13, 1962 4

FCC 65-403, released May 13, 1965 5

FCC 66-347, released April 21, 1966 7

FCC 67-518, released April 28, 1967 .....7, 20, 22

Prettyman, *Trial by Agency* (1959) 16, 21

Schwartz, *Comparative Television and the Chancellor's Foot*, 47 Geo. L.J. 655 (1959) 14

Wilcox, *Public Policies Toward Business* (1960) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

THE FEDERAL BROADCASTING SYSTEM, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner The Federal Broadcasting System, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on January 30, 1969.

OPINIONS BELOW

The Decision of the Federal Communications Commission (FCC 67-924), released August 3, 1967, upheld by the Court below, is reported at 9 F.C.C.2d 249

and 10 R.R.2d 1059,[1] and is printed in Appendix A, *infra*. The Memorandum Opinion and Order of the Federal Communications Commission (FCC 67-1276), released November 29, 1967, denying reconsideration, is reported at 10 F.C.C.2d 718, 11 R.R.2d 771, and is printed in Appendix B, *infra*. The Opinion of the panel of the Court of Appeals is not as yet reported and is printed in Appendix C, *infra*. The Order of the Court of Appeals denying rehearing by the panel and the letter from the Clerk of the Court of Appeals indicating that appellants' suggestion that the case be reheard *en banc* was not accepted by the Court are not reported and are printed in Appendix D, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on January 30, 1969 (App. C, p. 50a, *infra*). Petitioner filed a timely petition for rehearing on February 12, 1969. The Court of Appeals denied the petitions for rehearing filed by petitioner and the other appellants below on April 1, 1969.[2] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

---

[1] Citations to "R.R." or "R.R.2d" are to volumes of Pike & Fischer Radio Regulation. The Initial Decision rendered by a hearing examiner of the Federal Communications Commission (FCC 64D-5), released January 28, 1964, is reported at 9 F.C.C.2d 264 and is included in Volume 1 of the Joint Appendix in the Court of Appeals, which has been filed in this Court.

[2] Petitioner understands that several of the appellants in the court below intend to file a consolidated petition for certiorari. Petitioner assumes that, although it herein raises certain issues particularly applicable to it, this petition will be considered along with that consolidated petition.

QUESTION PRESENTED

Whether, in a comparative licensing proceeding, after declaring its intention to decide the case without further hearings "on the basis of the facts as they now exist" rather than solely on the basis of an admittedly stale record nearly five years old, an administrative agency may (1) arbitrarily limit its consideration to certain post-record factual changes and refuse to take into account other post-record changes of obvious decisional significance and (2) utterly fail to comply with its fundamental obligation of making adequate findings and furnishing a meaningful statement of reasons supporting its choice among the several competing applicants.

STATUTES INVOLVED

The provisions of the Communications Act of 1934 principally involved are set forth in Appendix E, *infra*.

STATEMENT

In pursuit of its goal to establish a nationwide competitive commercial television service with comparable outlets in the major markets for each of the three national television networks, the Commission in 1961 added Channel 13 as the third VHF channel in Rochester.[3] *Channel Assignment in Rochester, New York,* 21 R.R. 1748a (1961). Twelve applicants promptly filed applications for the channel, including the Rochester Area Educational Television Association, Inc. (RAETA), a nonprofit corporation organized to

[3] The Commission has reserved for television broadcasting 12 VHF (very high frequency) channels (2-13) and 70 ultra-high frequency (UHF) channels (14-83).

produce and present educational programs. RAETA and a regular commercial applicant submitted a single share-time proposal, under which RAETA would operate the proposed station as an educational station for part of each day and the commercial applicant would operate it as a regular commercial station for the remainder of the day. The remaining applicants, including petitioner, filed applications for a regular commercial operation to be affiliated with the ABC Television Network.

In early 1962, the Commission designated the competing applications for hearing on certain stated issues, including the all-important comparative issue, which read as follows:[4]

> "To determine on a comparative basis which of the mutually exclusive operations proposed in the above-captioned applications would best serve the public interest, convenience and necessity in light of the significant differences among the applicants as to:
>
> (a) The background and experience of each bearing on its ability to own and operate the proposed television broadcast station.
>
> (b) The proposals of each with respect to the management and operation of the proposed television station.
>
> (c) The programming service proposed in each of the above-captioned applications.
>
> (d) The programming service proposed in each of the applications considered in light of the following factors:

[4] The original designation order was released on January 2, 1962 (FCC 61-1511), and the comparative issue was modified by the addition of subparagraphs (c) and (d) in an order released on April 13, 1962 (FCC 62-385).

(1) Whether there are particular types or classes of programs for which there is an unfulfilled need in the area proposed to be served.

(2) The extent to which the program proposal of each applicant would meet such needs."

The hearing was held on several dates during 1962, and the record was closed in December, 1962. The process of filing proposed findings of fact and conclusions was completed on May 20, 1963. Eight months later, on January 28, 1964, the examiner issued her initial decision proposing to grant the share-time proposal by RAETA and Rochester Telecasters, Inc. (RTI) on the ground that there was an overriding need in the Rochester area for educational programs. In view of this basic determination, she saw no need to rank or evaluate the other applicants vis-a-vis each other under the Commission's comparative criteria. Exceptions to the initial decision and briefs in support thereof were filed with the Commission in April, 1964, and the Commission held oral arguments in the case on November 2, 1964.

Six months later, on May 13, 1965, the Commission reopened the record and ordered a further hearing on the key questions of (1) whether alternative means were available for the broadcast of the type of educational programming proposed by RAETA and (2) whether a share-time applicant such as RTI would provide an effective competitive outlet for a third major television network (FCC 65-403). The remand order also stated that the hearing would include other issues regarding the qualifications of the principals of the various applicants, planning and preparation, etc. The Commission ordered the applicants to bring their applications up to date within 90 days to reflect involun-

tary changes, such as those resulting from the death or disability of principals and also to revise their programming plans in accordance with any reassessment they might make of community needs in Rochester.

Shortly after the Commission issued its remand order, two significant events occurred. First, on July 28, 1965, the Commission promulgated its *Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C.2d 393, 5 R.R.2d 1901 (hereinafter *"Policy Statement"*).

In this *Policy Statement* the Commission restated and, in some very important respects, revised the criteria it would apply in comparative broadcast cases. In contrast with past practice, the comparative factor "diversification of control of the media of mass communications" (hereinafter called "diversification factor") was elevated to the primary position among the decisional factors in comparative broadcast cases because, in the words of the Commission, diversification "constitutes a primary objective in the licensing scheme." The comparative factor "full-time participation in station operation by owners," or integration of ownership and management, as it was known before the *Policy Statement* (hereinafter sometimes referred to as the "integration factor"), while of "substantial importance," was ranked second to the diversification factor and was treated as but one of several factors pertinent to the other primary objective in the licensing scheme, namely, provision of the best practicable service to the public. As shown below, the significance of the changes wrought by the *Policy Statement* was made manifest in certain cases decided after the issuance of the *Statement.* The Commission specifically stated in the *Policy Statement* that the *Statement would be applied in deciding pending cases.*

The second event of major significance was the voluntary dismissal of RAETA's application in January, 1966. With the funds obtained from the other applicants (except RTI) in reimbursement of its hearing expenses, RAETA eventually constructed a noncommercial educational television station on a UHF channel (Channel 21) reserved for educational use (Decision, ¶ 2).[5] The dismissal of the RAETA application removed from the case the applicant which the examiner had used as the standard against which the other applicants were measured, and it also completely eliminated the basis for the examiner's Initial Decision.

On April 21, 1966—nearly a year after its remand order—the Commission, stating it was acting because of the changed circumstances, cancelled the further hearing and rejected the amendments that it had invited from the applicants following their reassessment of community needs (FCC 66-347).

The Commission took no further action in the case until more than a year later. Finally, in response to certain pleadings filed by various applicants urging the Commission to resolve the case either in a manner which would encourage a merger among certain of the applicants or in the customary way of selecting a single winner, the Commission released an order on April 28, 1967, calling for further oral arguments on May 22, 1967 (FCC 67-518). The order recited that "a number of events have occurred since that date [November 2, 1964, date of the first oral argument] which may have a bearing upon the determination to be made herein." The second oral argument was expressly intended to

---

[5] All references to the Commission's final decision are shown as "Decision, ¶ ——." The entire Decision is printed below in Appendix A.

permit the parties "to address themselves to the remaining issues in this proceeding."

At the oral argument on May 22, 1967, the then counsel for petitioner responded to the Commission's invitation to address himself to the "remaining issues in this proceeding." Undoubtedly the most important "remaining issue" was the application of the *Policy Statement* in resolving the case. In view of the striking change wrought by the *Statement* in the importance and application of the diversification factor, counsel made the following solemn commitment on behalf of petitioner:

> "He [Gordon P. Brown, petitioner's sole stockholder] has a station in Rochester, and specifically if there is an objection to the station that can be cured. *He volunteers and agrees specifically to dispose of that station.*" (Emphasis supplied.) (T. 9931).[6]

The reference was to petitioner's standard broadcast station, WSAY, Rochester, New York, and the promise was repeated a bit later in the oral argument (T. 9933). Neither the Commission nor counsel for the other applicants objected to the propriety of petitioner's making that commitment at that time in response to the changed circumstances brought about by the issuance of the *Policy Statement*.

The Commission released its Decision on August 3, 1967. Only five of the seven Commissioners participated,[7] and they split 3-2 with dissenting Commissioner

---

[6] References to the transcript of the proceedings before the Commission are shown "(T. —)." The transcripts of proceedings of the 1964 and 1967 oral arguments before the Commission are included in Volume 8 of the Joint Appendix in the Court below, which has been filed in this Court.

[7] Commissioner Cox was shown as "not participating" and Commissioner Wadsworth as "absent."

Bartley voting for petitioner and dissenting Commissioner Johnson expressing a preference for Community Broadcasting, Inc. Since petitioner proposed 100% integration of ownership with management, and since such participation would be by a long-term local resident with many years of broadcast experience, the Commission gave petitioner a substantial preference over all of the other applicants on the integration factor (Decision, ¶ 8). However, the Commission gave each of the other applicants an equal preference over petitioner on the "very important" diversification factor because of petitioner's existing AM broadcast station (WSAY) in Rochester.[8]

To justify this conclusion the Commission stated that "[w]hile the weight of those preferences is diminished somewhat by the existence of other media of mass communications in the Rochester area, the preferences still must be considered substantial in this proceeding because each of these applicants would provide a new voice in the Rochester area" (Decision, ¶ 7).

The Commission ranked the winning applicant, Flower City Television Corporation ("Flower City"), second under the integration factor (Decision, ¶ 8), but Flower City was chosen over petitioner solely because of petitioner's existing Rochester broadcast sta-

[8] Gordon P. Brown, petitioner's sole stockholder, is also licensee of radio station WNIA in Cheektowaga, New York, about 70 miles west of Rochester. His ownership of that station, without WSAY, would not have been of decisional significance under the circumstances of the case. (See Decision, ¶ 7 and nn. 8, 9.) In any event, as noted below, Mr. Brown offered to dispose of WNIA if required by the Commission upon grant of a construction permit for Channel 13.

tion (WSAY) (Decision, ¶¶ 7, 13).[9] Thus, despite the Commission's stated intention to decide the case "on the basis of the facts as they now exist" (Decision, ¶ 6(e)), the Commission totally ignored petitioner's solemn promise to divest itself of its Rochester radio station. On the other hand, the Commission *did* take into consideration in its Decision certain changes affecting other parties, which occurred after the evidentiary record was closed. (See Decision, ¶ 6.) Most strikingly, the Commission gave full consideration to the post-record disposition of certain broadcast interests (including stations in Rochester itself) by certain principals in Star Television, Inc. ("Star") in ranking Star equal to all of the other applicants, except peti-

---

[9] "We find no significant difference among the applicants on diversification of control of mass communications media, except that, as pointed out above, Federal has other broadcast interests, including station WSAY in Rochester. The other important factors involved in this case are participation in station operation by owners and past record. On participation we have preferred Federal with Flower second, and on past record have given a preference to Community above all of the other applicants. We believe that Flower is to be preferred to Federal because of Federal's existing broadcast interests; we feel that the public's interest in a television station in Rochester which will provide an entirely new viewpoint in broadcasting not associated with any existing station is more important than the greater ownership participation which would be provided by Federal. We prefer Flower to Community because of Flower's superiority in the area of participation in station operation. This superiority arises from the experience factor. (We note that Community's participating stockholders also lack area familiarity.) We feel that Community's past record, while commendable, has not been shown to be so outstanding as to warrant substantial weight, since the past record is not that of Community itself, but rather of a 15% stockholder (and proposed general manager) who was a 50% owner of the station whose record is involved. For the foregoing reasons we have determined to make the grant to Flower." (Decision, ¶ 13).

tioner, with respect to the diversification factor (Decision, ¶¶ 6(b), 7).

Since the Commission rested its decision squarely upon Flower City's second best preference under the integration factor,[10] *it is clear that petitioner would have prevailed before the Commission but for the Commission's unwarranted and unexplained refusal to consider petitioner's commitment to dispose of its radio station.*

On September 5, 1967, petitioner and all but one of the other losing applicants filed timely petitions for reconsideration by the Commission.[11] On page 9 of its petition for reconsideration, petitioner stated formally that Mr. Brown was willing to dispose of his Cheektowaga station as well as WSAY "if requested by the Commission on the grant to it [petitioner] of Channel 13."[12] The Commission's Memorandum Opinion and Order released November 29, 1967, denying reconsideration, failed to consider, or even mention, petitioner's solem commitment to dispose of its radio stations. The Commission voted 4-2 to deny reconsideration, with Commissioner Bartley dissenting and stating once again that he would grant petitioner's application, Commissioner Johnson dissenting without further comment, and Commissioner Cox not participating.

---

[10] No other comparative factor was of decisive significance in the Commission's choice of Flower City.

[11] Included in Volume 9 of the Joint Appendix in the Court below, which has been filed in this Court.

[12] By an amendment tendered for filing with the Federal Communications Commission on March 8, 1968, petitioner and its sole stockholder again asserted that they "will" dispose of Radio Stations WSAY and WNIA upon a grant of petitioner's television application.

On December 29, 1967, petitioner and all but one of the other losing applicants appealed to the Court below.[13] In the joint brief filed by petitioner and the other losing applicants in the Court below, petitioner contended that the Commission had improperly failed to consider its contentions regarding diversification of control of the mass media of communications, including its promise to dispose of its existing stations (Brief for Appellants, pp. 71-73). In its opinion affirming the Commission, issued on January 30, 1969, the Court below made no specific reference to that argument. Although Judge Leventhal, in his dissenting opinion, did not focus on this point, he was deeply concerned with the Commission's conduct of the proceeding. He concluded that "the findings fail to support the [Commission's] order in that the Commission failed to set forth its reasons for preferring Flower" and that "sound principles of administrative law and judicial review require remand to the Commission" (App. C, p. 37a, *infra*).

REASONS FOR GRANTING THE WRIT

This case poses questions of vital importance in the field of administrative law generally and, more particularly, in the selection of television and radio broadcasters in comparative broadcast proceedings—questions relating to the basic integrity of the process by which the Federal Communications Commission selects among competing applicants for broadcast facilities. The decision below allows that process to become simply an exercise of administrative fiat.

---

[13] Star Television, Inc., had filed its appeal in the court below on September 5, 1967, in lieu of filing a petition for reconsideration with the Commission.

Petitioner was, by the Commission's own Decision, far superior to all of the other applicants on the very important integration factor. Yet, the Commission preferred another applicant considerably inferior to petitioner on this factor solely because of petitioner's existing ownership of an AM radio station in Rochester. In arbitrarily refusing to consider petitioner's solemn commitment to dispose of that station, while at the same time considering other post-record changes of decisional significance, the Commission has raised a fundamental issue concerning the validity and rationality of the process by which it selects among competing applicants for broadcast facilities. Judge Leventhal stated the basic question with great precision:

> "... Should the courts continue to adhere to the approach of requiring the agency to develop a meaningful statement of reasons for a function like this, of choosing the best qualified among several competing applicants?" (App. C., p. 47a, *infra*).

Thus this case poses the fundamental issue of whether the comparative hearing process—as conducted not only by the Federal Communications Commission, but by the other federal agencies as well—can be a truly rational process. If the Commission's action in the instant case is allowed to stand, a major step away from rationality in the comparative hearing process will have been sanctioned.[14]

---

[14] Students of the hearing process have frequently criticized the FCC's failure to achieve rationality in the broadcast comparative hearing process and have offered suggestions for improvements or substitutions for the process itself. See, *e.g.*, Fisher, *The President's Comment*, 21 Fed. Com. B.J. 115 (1967); Grunewald, *Should the Comparative Hearing Process Be Retained in Television Licensing?*, 13 Amer. U.L. Rev. 164 (1964); Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Stand-*

The fundamental issues presented in this case are of very timely concern in the field of comparative broadcast hearings themselves. In a departure from past policy, the full scope of which will undoubtedly unfold in the not too distant future, the Commission recently ruled that it would give unqualified application to its *Policy Statement* in comparative hearings in which one of the competing applicants is seeking renewal of an existing license. *WHDH, Inc.*, 16 F.C.C. 2d 1, 15 R.R.2d 411, *reconsideration denied*, 16 R.R.2d 185 (1969).[15] In the *WHDH* case the Commission for the first time refused to renew a broadcast license and instead awarded the facility to another applicant on solely comparative (as distinguished from disqualifying) grounds. Since the *WHDH* decision, there have been quite a few instances of filings on top of existing

---

ards, 75 Harv. L. Rev. 1055, 1070-72 (Part 2, 1962); Levin, *Regulatory Efficiency, Reform and the FCC*, 50 Geo. L.J. 1 (1961); Landis, *Report on Regulatory Agencies to the President-Elect*, Subcommittee on Administrative Practice and Procedure of Senate Committee on Judiciary, 86th Cong., 2d Sess., p. 53 (Committee Print 1960); Wilcox, *Public Policies Toward Business* 710 (1960); Schwartz, *Comparative Television and the Chancellor's Foot*, 47 Geo. L.J. 655, 695 (1959). Judge Leventhal himself suggested in his thoughtful dissenting opinion in the court below:

> "Perhaps the Commission could advise the two or three applicants who survive after the first winnowing that they are in a run-off and now have the opportunity to enlarge the record in a more focused way. Perhaps the parties could settle the case. Perhaps a lottery could be used, for luck is not an inadmissible means of deciding the undecidable, provided the ground rules are known in advance." (Footnote omitted.). (App. C., pp. 47a-48a, *infra*).

[15] The Commission had expressly stated in its *Policy Statement* that the *Statement* does not attempt to deal with the somewhat different problems raised where an applicant contests with an existing licensee seeking renewal of his license. *Policy Statement*, 1 F.C.C.2d 393, 5 R.R.2d 1901, n. 1 (1965).

licensees seeking renewal of their licenses.[16] Thus, the era of the major broadcast comparative case is still here, and the Commission, like the other federal agencies, will continue to perform as one of its key duties the selection of grantees in comparative hearing proceedings. Indeed, this Court very recently observed that "[c]omparative hearings between competing applicants for broadcast spectrum space are by no means a thing of the past." *Red Lion Broadcasting Co. v. FCC*, 37 U.S.L. Week 4509, 4518 (June 9, 1969). The departure by the Federal Communications Commission in the case at bar from the accepted and required course of procedure in comparative administrative proceedings, as outlined below, thus requires immediate correction by this Court. Rule 19(b).[17]

1. The Commission's Arbitrary Refusal To Consider Petitioner's Solemn Commitment To Dispose of Its Rochester Station, While Taking Into Consideration Other Post-Record Changes of Decisional Significance, Requires Reversal and Remand of the Case to the Commission.

The Commission's arbitrary refusal to take into consideration petitioner's solemn commitment to dispose of its Rochester station and its failure to support its choice of Flower City on a rational basis show that the administrative process suffered a substantial breakdown

[16] For example, competing applications have been filed against renewal applicants for Channel 4 in Los Angeles, California; Channel 7 in Boston, Massachusetts; and Channel 3 in Jackson, Mississippi. In addition, a new applicant very recently tendered for filing with the Commission an application competing with the present licensee of station WPIX, Channel 11, New York, New York, FCC Public Notice, Report No. 8571, p. 4 (June 4, 1969).

[17] Since jurisdiction to appeal from an order of the FCC in broadcast application cases lies only in the United States Court of Appeals for the District of Columbia Circuit, 47 U.S.C. § 402(b), there can be no question of a conflict between circuits in this case.

in the case at bar.[18] As noted, the Commission preferred Flower City to petitioner solely because of petitioner's AM radio station in Rochester. In the Commission's view, providing a new broadcast voice in Rochester is more important than the greater ownership participation in management which would be provided by petitioner (Decision, ¶ 13).[19] This has not al-

---

[18] In this case, the Commission certainly ignored the fundamental axiom enunciated by Judge Prettyman:

> "The function of an administrative agency is the administration of law—no more, no less. It has no other function. It has no other power. It has no other duty. It is circumscribed, restricted, bound by that proposition. Its every policy should be selected by that test and that test only. The validity of its every action should be measured by that standard. When it makes rules, which are laws, it should abide the requirements of the law for lawmaking. When it makes orders, which are decrees, it should abide the requirements of the law for adjudication. All else in the way of guides or standards or measurements ought to be discarded, forgotten, avoided, put away, save only the simple idiom that the sole function of an agency is to administer law." Prettyman, *Trial By Agency* 10,11 (1959),

[19] The Commission majority rather woodenly assumed that the introduction of a so-called "new voice" in Rochester would promote its policy of fostering "the widest possible dissemination of information from diverse and antagonistic sources" (WHDH, Inc., 15 R.R.2d 411, 426 (1969)). In so doing, it completely ignored the quality of the "voices" involved, as pointed out by dissenting Commissioner Bartley:

> "The majority here states that the preferences to the other applicants 'must be considered substantial in this proceeding because each of those applicants would provide a "new voice" in the Rochester area.' I disagree. I believe that more basic than the matter of a 'new voice' is the quality of the 'voice' that is added to the area." (App. A, p. 20a, *infra*).

The Commission wholly ignored petitioner's demonstrated record of opposition to the "establishment" and the existing newspaper monopoly in Rochester (T. 9932), a position which petitioner had asserted with great vigor and consistency throughout the case. Petitioner's long opposition to the monopolistic newspaper establishment in Rochester is amply documented in the history of the

ways been the Commission's view. Prior to the issuance of its *Policy Statement* in 1965,[20] and certainly up to the close of the hearing record in December 1962, the Commission gave far less prominence to the diversification factor in comparative broadcast cases than it has in recent years. Indeed, following the issuance of the *Policy Statement,* the diversification factor has been placed in the primary position in comparative cases.[21]

Rochester Channel 10 case. WHEC, Inc., 24 F.C.C. 147, 14 R.R. 150, *aff'd,* 106 U.S. App. D.C. 162, 270 F. 2d 914 (1959), *cert. denied,* 362 U.S. 935 (1960).

The Commission also ignored the fact that, by accepting petitioner's commitment to divest its radio station WSAY, it could add a "new voice" to Rochester as the new licensee of WSAY. The Commission has ample power to assure that petitioner assign its license for WSAY to someone not now engaged in the mass media of communications in Rochester.

[20] The Commission applied its *Policy Statement* in deciding the instant case (Decision, ¶ 3).

[21] *Compare* Indianapolis Broadcasting, Inc., 22 F.C.C. 421, 12 R.R. 883 (1957); WHEC, Inc., *supra;* Television Broadcasters, 27 F.C.C. 727, 17 R.R. 1169 (1959), *with* the *Policy Statement,* ¶ 1; Farragut Television Corp., 5 F.C.C. 93, 8 R.R.2d 552 (1966); Lewis Broadcasting Corp. 11 F.C.C.2d 889, 12 R.R.2d 627 (1968). The marked change in the Commission's attitude toward the significance of the diversification factor in comparative cases following the issuance of its *Policy Statement* is graphically illustrated in the two WHDH cases. In the first case, the Commission said:

> "However, the ultimate significance of this preference is diluted by the presence in the community of very extensive numbers of newspapers, as well as AM, FM and television stations unassociated with the applicants. The Commission's policy of fostering diversified ownership of mass media of communication stems from the belief that the widest possible dissemination of information from diverse and competing sources best serves the public interest. Manifestly, the weight to be accorded this policy in any given case must take into account the competitive situation existing in the community involved. Where, as here, the proposal is for a community already served by numerous diversely owned outlets of expression, a grant to an entity controlling a minor fraction of such outlets has less tendency to bring about the concentra-

In view of the state of the law at the time the comparative hearing was held, petitioner could reasonably expect that its strong preference on the integration factor[22] would completely outweigh and neutralize

---

tion of media control which the Commission's diversification policy is designed to avoid. Therefore, although Greater Boston is entitled to a substantial preference on the diversification criteria, the decisional impact of that preference is far less than it might be if the competing applications were for a community possessing fewer existing media." WHDH, Inc., 33 F.C.C. 449, 453, 24 R.R. 255, 260 (1962).

In striking contrast is the Commission's statement in the recent second *WHDH* case:

> "As noted in the Policy Statement, diversification is a factor of first significance since it constitutes a primary objective in the Commission's licensing scheme. The benefits derived from diversification have been set forth in many cases decided by the courts and by the Commission, and they need not be recited in detail here. When compared with Charles River and BBI, WHDH manifestly ranks a poor third because of its ownership of a powerful standard broadcast station, an FM station, and a newspaper in the city of Boston itself. While it is true that the existence of numerous other media in Boston in which WHDH has no ownership interest may not be ignored and does somewhat diminish the weight to be accorded the preferences to Charles River and BBI on local diversification, nonetheless those preferences are quite significant here. *A grant to either Charles River or BBI would clearly result in a maximum diffusion of control of the media of mass communications as compared with a grant of the renewal application of WHDH. A new voice would be brought to the Boston community as compared with continuing the service of WHDH-TV. We believe that the widest possible dissemination of information from diverse and antagonistic sources is in the public interest, and this principle will be significantly advanced by a grant of either the Charles River or the BBI application.*" (Emphasis supplied.) (Footnote omitted.) 15 R.R.2d at 426-27.

[22] The Commission itself acknowledged that, in petitioner's case, participation in full-time station operation would be by petitioner's sole stockholder, "a long-time local resident with many years of radio experience" (Decision, ¶ 8).

whatever slight chilling effect its existing broadcast interests might have had upon its prospects, especially in view of the fact that there were so many broadcast stations already licensed to Rochester.[23] Petitioner recognized that a significant change in Commission policy had occurred since the close of the evidentiary record and, accordingly, at the first practicable opportunity in the regular course of the case,[24] it made a solemn commitment to divest itself of Station WSAY upon grant of a construction permit for Channel 13.[25]

Indeed, in making this commitment, petitioner was responding to the Commission's express invitation to

[23] At the time Commissioner Bartley wrote his dissent in the case at bar, there were 16 broadcast stations licensed in Rochester (Commissioner Bartley's dissenting opinion, App. p. 20a, *infra*). In Travelers Broadcasting Serv. Corp., 21 F.C.C. 110, 12 R.R. 689 (1956), the Commission awarded a television permit to an applicant with a local AM-FM interest, suggesting that there was "no pronounced tendency toward concentration of control of communications media locally," 21 F.C.C. at 215, 12 R.R. at 806d. See also St. Louis Telecast, Inc., 22 F.C.C. 625, 12 R.R. 1289, 1389-90 (1957), where the Commission awarded a license to an applicant with substantial local communications interests, and Hi-Line Broadcasting Co., 22 F.C.C. 891, 13 R.R. 1017 (1957).

[24] Since, as noted, the Commission withdrew its remand of the proceeding and never reopened the hearing record, the oral argument held on May 22, 1967, before the Commission *en banc*, was the first opportunity in the normal course of the proceeding for petitioner to make this commitment.

[25] The ownership of Station WNIA in Cheektowaga, New York, by petitioner's sole stockholder is not material with respect to the diversification factor. Cheektowaga is about 70 miles from Rochester, and it is clear from the Commission's Decision that, without Station WSAY, petitioner would have stood on about an equal footing with the other applicants vis-a-vis the diversification factor. (See Decision, ¶ 7 and nn. 8, 9.) In any event, in its petition for reconsideration filed with the Commission, petitioner expressed the willingness of its sole stockholder to dispose of Station WNIA upon grant of petitioner's application.

the parties in its order of April 28, 1967 (FCC 67-518) "to address themselves to the remaining issues in this proceeding". The 1967 oral argument was plainly intended by the Commission to dispose of matters which arose since the closing of the hearing record.[26] Petitioner accepted the Commission's invitation—and neither the Commission nor any of the other parties raised any objection to petitioner's making its commitment to divest at that stage of the proceeding.[27] Petitioner, under the circumstances, had a right to expect that its commitment would be honored, since the Commission has long relied upon and accepted commitments to divest interests in existing broadcast facilities upon the grant of pending broadcast applications, and it has done so in comparative hearing situations. See, *e.g., Community Television Corp.*, 32 F.C.C. 923, 24 R.R. 1 (1962); *Broadcasters Inc.*, 29 F.C.C. 366, 19 R.R. 731 (1960).

Irrespective of the timeliness of petitioner's commitment to divest, the Commission's total disregard of petitioner's solemn commitment to divest in both its Decision and order denying reconsideration was arbitrary and unjust, since it did take into account certain other events which occurred after the close of the evi-

---

[26] For example, the Commisison considered RTI's pending motion for leave to amend its applieation so as to specify full-time operation.

[27] In their briefs filed in the court below, both Flower City and the Commission belatedly objected to petitioner's making its commitment to divest at the 1967 oral argument. Rather than being a mere untimely attempt to improve its comparative position, as contended by Flower City and the Commission, petitioner's commitment at the oral argument was a timely effort, in the context of the entire proceeding, to join with the other parties in addressing themselves to "the remaining issues in this proceeding."

dentiary record. (See Decision, ¶ 6.) For example, in ranking Star equal to all of the other applicants, except petitioner, with respect to the diversification factor, the Commission plainly relied upon the post-record disposition of various broadcast interests (including some in Rochester itself) by various principals of Star. (Decision, ¶¶ 6(b), 7).[28]

It is the obligation of an administrative body to decide a case on the basis of all facts properly before it. The Commission may not rely solely on those facts which support the ultimate result it desires, whether such facts are contained in the record or offered and received after the close of the record. To pick and choose arbitrarily among post-record facts, as the Commission did here, is contrary to law and destructive of the administrative process. See, *e.g.*, *ICC* v. *Louisville & N. Ry.*, 227 U.S. 88, 93 (1912); *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608 (2d Cir. 1965), and cases cited therein; Friendly, *The Federal Administrative Agency* 144 (1962); Landis, *The Administrative Process* 36-46 (1938).[29]

---

[28] The Commission's statement in its Decision (¶ 6(e)) that it desired to decide the case "on the basis of the facts as they now exist" is in accord with long-standing Commission policy to insure that its public interest determinations are based on up-to-date facts. See Section 1.65 of the Commission's Rules, 47 C.F.R. § 1.65; Report of Changed Circumstances, 3 R.R.2d 1622 (1964).

[29] See also Prettyman, Trial By Agency 7-8 (1959). Judge Prettyman precisely defined the limits of administrative discretion, as follows:

> "We often hear of administrative discretion. There is such a thing. But administrative discretion is no broader or stronger in its field than is judicial discretion in its field, or legislative discretion in its field, or executive discretion in its field." *Id.* at 8.

2. The Commission's Arbitrary Refusal To Consider the New Information Submitted by Petitioner in Response to the Policy Statement, Which Substantially Changed the Ground Rules Governing Comparative Broadcast Proceedings, Requires Reversal and Remand of the Case to the Commission.

Petitioner does not suggest that the Commission could not issue its 1965 *Policy Statement* and then apply it to the case at bar. However, petitioner does contend that the Commission cannot have its cake and eat it. In the course of a proceeding, the Commission cannot change the rules of the game, as it did in issuing the *Policy Statement,* especially with regard to the very important diversification factor, and then refuse to permit the parties to address themselves in a meaningful way to the new issues occasioned by the issuance of such *Statement.* The Commission should either have allowed its remand order to stand and thus have held further evidentiary hearings, followed by the issuance of a new initial decision,[30] or it should have devised some other procedure which would have enabled the Commission to decide the case with all pertinent information before it. As noted, the Commission supposedly chose the latter course in its order of April 28, 1967 (FCC 67-518) scheduling further oral argument on May 22, 1967. Having made its choice, the Commission could not refuse to consider the new information submitted by petitioner in reaction to the new view of the diversification factor expressed

[30] The staleness and insufficiency of the examiner's initial decision in the case at bar, which was issued prior to the Commission's 1965 *Policy Statement,* was further aggravated by the dismissal of RAETA's application in 1966. Such dismissal completely destroyed the foundation of the examiner's initial decision and made such decision useless as a vehicle for bringing before the Commission meaningful exceptions based on the current factual situation.

in the *Policy Statement* and subsequent cases. For the Commission totally to ignore facts relevant under its new *Policy Statement,* as it did with respect to petitioner's solemn promise to divest, is an unreasonable and unexplained departure from its declared intention to apply the *Policy Statement* in deciding the case at bar. Because of this unwarranted departure from the Commission's own declared procedures for resolving the case, under prior decisions of this Court the judgment below should be reversed and the case remanded to the Commission for further proceedings. *Vitarelli* v. *Seaton,* 359 U.S. 535 (1959); *Service* v. *Dulles,* 354 U.S. 363 (1957); *Acardi* v. *Shaughnessy,* 347 U.S. 260 (1954); *SEC* v. *Chenery Corp.,* 318 U.S. 80, 87-88 (1943).

3. The Commission's Failure To Give a Rational Explanation of (1) Its Refusal To Consider Petitioner's Commitment To Divest, as Developed in the Preceding Two Points, and (2) Its Preference for Flower City Requires Reversal and Remand of the Case to the Commission.

At minimum, petitioner was entitled to a rational explanation by the Commission of its refusal to consider petitioner's commitment to divest while at the same time considering other post-record changes of decisional significance. Nowhere in either the Commission's Decision or order denying reconsideration can such an explanation be found. The Commission's failure to give such explanation and to set forth its reasons for preferring Flower City entitles petitioner to summary reversal and remand to the Commission for further proceedings. *Burlington Truck Lines, Inc.* v. *U. S.,* 371 U.S. 156, 167-168 (1962); *FCC* v. *RCA Communications, Inc.,* 346 U.S. 86, 90 (1953); *Seigel Co.* v. *FTC,* 327 U.S. 608, 613-14 (1946); *Phelps Dodge Corp.* v. *Labor Board,* 313 U.S. 177, 197 (1941).

CONCLUSION

For the reasons stated above, the writ of certiorari should issue. The decision below should be reversed summarily and the case remanded with directions that the Commission reconsider its decision in light of petitioner's commitment to dispose of its existing broadcast interests.

Respectfully submitted,

EDWARD J. GRENIER, JR.
Counsel for Petitioner

SUTHERLAND, ASBILL & BRENNAN
Of Counsel